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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 40067-2012
)	
v.)	
)	
KENNETH WAYNE LAMB,)	
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

Appeal From The District Court Of The Third Judicial
District Of The State Of Idaho, In And For The
County Of Canyon

Honorable Molly J. Huskey
District Judge

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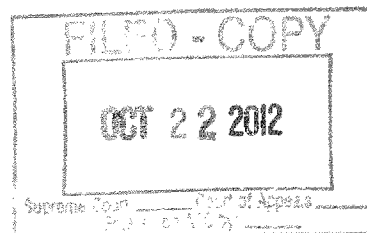


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STATEMENT OF THE CASE

Nature of the Case

Kenneth Wayne Lamb pled guilty to one count of Lewd Conduct with a Minor Under 16, a violation of Idaho Code §18-1508. Although the prosecutor recommended a significantly lower fixed sentence, the District Court instead imposed a unified sentence of twenty-five years, with fifteen years fixed, and ten years indeterminate. The District Court failed to sufficiently consider all of the mitigating factors present in this case – most notably, that Mr. Lamb accepted responsibility, had severe substance abuse issues, had no prior felony record, had significant mental health issues, and received a recommendation from the State which equated to a third of the sentence actually imposed – and therefore the District Court abused its discretion in imposing that sentence.

Mr. Lamb submits that the District Court abused its discretion and acted in manifest disregard of Idaho law, when the Court failed to require a mental health evaluation in accordance with Idaho Code §19-2522.

Statement of the Facts and Course of Proceedings

On November 9, 2011, Corporal Donahue of the Canyon County Sheriff's Office received a call from police dispatch regarding a potential sex offense. Donahue responded to West Valley Medical Center and met with Caldwell City Police deputies, who had detained Kenneth Wayne Lamb. Mr. Lamb had been read his *Miranda* rights by Caldwell City Police officer C. Ivie, who detained Mr. Lamb after Lamb admitted to having intercourse with his minor stepdaughter, [REDACTED] [REDACTED]

¹ The Statement of Facts is derived from the PreSentence Investigation Report at p. 2.

The attending physician to a patient named [REDACTED] [REDACTED] aged 12 at the time, had determined that Ms. Kennedy was eight weeks pregnant. Further, Ms. Kennedy named Kenneth Wayne Lamb, her stepfather, as the father of the child. Mr. Lamb admitted that he had engaged in sexual intercourse with Ms. Kennedy, his stepdaughter, and was the father of the child.

Lamb was interviewed by officers. He admitted that he had been engaging in sexual intercourse with Ms. Kennedy for at least the past three months, sometimes on a daily basis while other times at a rate of approximately three times per week.

The State issued a Criminal Complaint against Mr. Lamb on November 9, 2011, charging Mr. Lamb with one count of Lewd Conduct With a Minor Under 16, a violation of Idaho Code §18-1508. (R., pp. 6-7). A Preliminary Hearing was waived. An Information was filed on November 23, 2011, containing the same charge as the Complaint. (R., pp. 16-17).

Mr. Lamb changed his plea to guilty on January 30, 2012, based on a loosely-defined plea agreement between the parties. (*See* Tr., p. 6). The Court scheduled the case for sentencing on April 2, 2012, ordered a Pre-Sentence Investigation Report (“PSR”), and ordered a psycho-sexual evaluation for sentencing purposes. (R., pp. 40-41). The District Court apparently ordered a mental health evaluation pursuant to I.C. §19-2522 (*see* Tr., p. 26), but a mental health evaluation was not obtained or completed. (*See generally*, R.; PSR.)

At Mr. Lamb’s Sentencing Hearing, the District Court imposed a unified sentence of twenty-five years, with fifteen years fixed and ten years indeterminate. (Tr., pp. 56-57). Mr. Lamb timely appeals from the District Court’s judgment of conviction. (R., pp. 65-68).

ISSUES

1. Whether the District Court abused its discretion when it imposed an excessive unified sentence of twenty-five years, with fifteen years fixed, upon Mr. Lamb following his plea of guilty to Lewd Conduct?
2. Whether the District Court committed reversible error when it failed to require a mental health evaluation of Mr. Lamb for sentencing?

ARGUMENT

I.

The District Court Abused Its Discretion When It Imposed An Excessive Unified Sentence Of Twenty-Five Years, With Fifteen Years Fixed, Upon Mr. Lamb Following His Plea Of Guilty To Lewd Conduct

A. Introduction

Kenneth Wayne Lamb did not proceed to trial, but rather pled guilty prior to trial. He accepted responsibility for his conduct and pled guilty to one count of Lewd Conduct With a Minor. The Government recommended a sentence of 5 years determinate and life indeterminate. (Tr., p. 47). The defense recommended a sentence of retained jurisdiction. (Tr., pp. 36-37).

Following his plea of guilty, the District Court sentenced Mr. Lamb to a unified sentence of twenty-five (25) years, with fifteen (15) years determinate. (Tr., pp. 56-57).

Several mitigating factors were present in Mr. Lamb's case, all of which indicated that a more lenient sentence would have been appropriate, particularly in light of the fact that even the prosecuting attorney's recommended sentence was significantly shorter than the one imposed by the District Court. Other mitigating factors included the facts that Mr. Lamb accepted responsibility for his actions, had no prior felony record, had severe substance abuse issues, and suffered from significant mental health issues.

The District Court's insufficient consideration of all the mitigating factors, and therefore, its insufficient consideration of Idaho's recognized sentencing objectives, caused it to impose an excessive sentence in an abuse of its discretion. This Court should remedy that abuse.

B. The District Court Failed To Sufficiently Consider The Mitigating Factors Present In This Case And So Imposed An Excessive Sentence, With A Fixed Term More Than Three Times As Long As Even The State Recommended

1. Introduction

Mr. Lamb asserts that, given any view of the facts, his unified sentence of twenty-five years, with fifteen years fixed, is excessive. When a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record, giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 772 (Ct. App. 1982).

The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997)(quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Lamb does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, he must show that, in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria, or sentencing objectives, are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* The protection of society is the primary objective the sentencing court should consider. *State v. Charboneau*, 124 Idaho 497, 500 (1993). Therefore, a sentence that protects society and also accomplishes the other objectives will be considered reasonable. *Id.*; *State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982). This is because the protection of society is influenced by each of the other objectives, and as a result, each must be addressed in sentencing. *Charboneau*, 124 Idaho at 500.

The appellate court should consider several factors to determine whether the objectives are served by a particular sentence. *State v. Knighton*, 143 Idaho 318, 320 (2006). They include, but are not limited to “the defendant’s good character, status as a first-time offender, sincere expressions of remorse and amenability to treatment, and support of family².” *Id.*; *see also* I.C. §19-2521 (wherein the Legislature articulated several factors it suggested the sentencing court consider in its determination of whether to place the defendant on probation, or whether the facts indicate that it should depart from that result and impose a prison sentence).³ Insufficient consideration of these factors has been the basis for a more lenient sentence in several cases. *See, e.g., Cook v. State*, 145 Idaho 482, 489-90 (Ct. App. 2008); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991); *State v. Carrasco*, 114 Idaho 348, 354-55 (Ct. App. 1988), *rev’d on other grounds*, 117 Idaho 295, 301 (1990); *State v. Shideler*, 103 Idaho 593, 595 (1982). In this case, several of those factors were present, but were insufficiently considered by the

² Mr. Lamb had clear and strong support from his family, as noted by the District Court at his Sentencing Hearing. (Tr., p. 58). This factor was clearly met in Mr. Lamb’s case.

³ As the Idaho Supreme Court has recognized in regard to this particular statute, the Legislature intended to provide sentencing courts with a list of factors to consider when exercising its discretion. *State v. Stover*, 140 Idaho 927, 931-32 (2004). The language the Legislature chose to use in providing this list of factors clearly indicates that the sentencing court should start with the presumption that it will impose probation, unless it finds that society requires the more intensive protection provided by incarcerating the defendant. *See* I.C. § 19-2521(1); *State v. Statton*, 136 Idaho 135, 137 (2001); *State v. Merwin*, 131 Idaho 642, 648 (1998); *State v. Lee*, 117 Idaho 203, 205 (Ct. App. 1990). This does not mean that everyone convicted of a crime should be placed on probation. *See Stover*, 140 Idaho at 932; *see also State v. Coassolo*, 136 Idaho 138, 143 (2001) (holding that where the State only provides the possibility for probation, there is no due process expectation that the defendant will receive probation). Rather, it only indicates that the Legislature suggested the district court should consider probation the favored result, which should be imposed unless its analysis of the factors indicates incarceration and more extensive punishment is necessary. *See* I.C. § 19-2521(1).

District Court when it determined Mr. Lamb's sentence. As a result, his sentence did not serve the recognized sentencing objectives and was excessive.

Additionally, the Eighth Amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. U.S. CONST., amend. VIII. The Eighth Amendment prohibition against the infliction of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed. *Gonzalez v. Duncan*, 551 F.3d 875, 879 (9th Cir. 2008). In addition to the statutory arguments submitted herein, Mr. Lamb also asserts that his sentence violated his Eighth Amendment rights by being greater than necessary to accomplish the goals and objectives of sentencing and by being disproportionate to his crime, and therefore constituted "cruel and unusual punishment". This Court should remedy any constitutional violations by reversing Mr. Lamb's sentence.

2. Lack of Prior Record

One of the enumerated factors under Idaho law indicating prison is inappropriate (lack of a prior record) directly applied to Mr. Lamb's case. *See* I.C. §19-2521(2)(g). This was Mr. Lamb's first felony conviction.⁴ (PSR, p. 4). In fact, it was only his second adult charge of any kind, his only other charge being a "fish and game" violation. *Id.* The Idaho Supreme Court has previously considered the fact that the defendant had no felony record to be a mitigating factor which partially justified a more lenient sentence. *Shideler*, 103 Idaho at 595; *State v. Nice*, 103 Idaho 89, 90 (1982); *see also* I.C. § 19-2521(1)(f), (2)(g) (indicating that where the defendant does not have a significant record,

⁴ Mr. Lamb was later charged with Conspiracy To Commit Escape, a violation of Idaho Code §§37-2732 and 18-2505, while incarcerated on the Lewd Conduct charge. Since this offense occurred after Lamb's arrest herein, counsel is not considering this offense as a "prior offense" to the Lewd Conduct charge.

the sentencing court should be more disposed to suspending the sentence rather than opting for imprisonment). The logic in support of this proposition is that such a person usually does not yet have a fixed character for crime and therefore rehabilitation at this early stage is more likely. *See State v. Owen*, 73 Idaho 394, 402 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 228 (1971).

The Idaho Supreme Court provided significant guidance on this issue in *State v. Shideler*, *supra*. In *Shideler*, the defendant pled guilty to a charge of armed robbery, while charges of assault with a deadly weapon and possession of a firearm during the commission of a crime were dismissed. The district court sentenced the defendant to an indeterminate term of twenty years. *Shideler*, 103 Idaho at 593.

The Supreme Court reviewed the sentence under an “abuse of discretion” standard, and overturned the sentence. The Court found that the crime was very serious and threatened harm to others, and that a “substantial sentence of imprisonment” was required, both for protection of society and to “reflect society’s condemnation of the defendant’s behavior” and for general deterrence. *Id.* at 594. However, the Court looked closely at the defendant’s personal characteristics, noting specifically that the defendant had no prior criminal history and had severe mental health issues. *Id.*

The Supreme Court overturned the twenty-year indeterminate sentence imposed upon the convicted robber. The Court noted that

“this was the defendant’s first felony with no prior history of any criminal activity and this court has ‘recognized that the first offender should be accorded more lenient treatment than the habitual criminal.’” *Id.*(citing *State v. Owen*, 73 Idaho 394, 402 (1953)(overruled on other grounds)).

The Court further noted that the defendant had accepted responsibility for his acts, and reduced his sentence from an indeterminate twenty year sentence to an indeterminate twelve year sentence, a time reduction of forty percent. *Id.* at 595.

Mr. Lamb asserts that the *Shideler* case should guide this Court in its assessment of his appeal. The *Shideler* case provides guidance for several reasons, including the similarities in the defendant's mental health issues as well as their mutual acceptance of responsibility. It should be noted, of course, that Mr. Shideler obtained a sentence reduction on appeal despite having committed a violent offense which apparently involved use of a deadly weapon, while Mr. Lamb's offense did not contemplate or threaten violence or risk of death to others. Mr. Lamb's offense was serious, no doubt, but no one could have been seriously injured or killed as a result. Finally, the *Shideler* Court placed great significance on the lack of a prior record, similar to Mr. Lamb. *See Id.* at 595. Mr. Lamb urges this Court to give great weight to the *Shideler* decision.

It is important to note that not only did Mr. Lamb have no prior felony record, at age 28, he also had only one misdemeanor. (PSR, p. 4). This particular misdemeanor (a fish and game offense) was a regulatory-type offense only, and not a crime of violence or a crime against others. Mr. Lamb had no prior history of violent offenses, drug-related offenses, or sexual-related crimes.

Thus, Mr. Lamb's limited and non-felony criminal record, along with his willingness to accept responsibility for his actions, indicated that a more lenient sentence was appropriate. *See, e.g.*, I.C. § 19-2521(1)(f), (2)(g); *Shideler*, 103 Idaho at 595; *State v. Hall*, 114 Idaho 887, 889 (Ct. App. 1988). Based thereon, Mr. Lamb asserts that the District Court abused its discretion by imposing an excessive sentence.

3. Acceptance of Responsibility

Mr. Lamb accepted responsibility for his actions, by pleading guilty and admitting his behavior. (Tr., p. 24). He also expressed his remorse, indicating his sorrow and remorse directly to the victim in the PSR. (See PSR, p. 4)(stating verbatim that “I want to let everyone who reads this know that I am truly sorry for what I did and I wish I could tell that to the victim herself”, and “I feel so bad for what I did. ... I wish I could tell the victim that I am so sorry for what I did to her.”)(grammatical errors corrected).

Acknowledgment of guilt and acceptance of responsibility by the defendant are critical first steps toward rehabilitation. See *State v. Kellis*, 148 Idaho 812, 815 (Ct. App. 2010), *rev. denied*. By making these acknowledgements, Mr. Lamb demonstrated that he had taken these critical first steps. They also demonstrated that he was and is amenable to treatment. (See Tr., p. 35-36).

Additionally, Mr. Lamb’s acknowledgment of guilt and his acceptance of responsibility, and expressions of remorse, satisfy a statutory factor “in favor of avoiding a sentence of imprisonment. See Idaho Code §19-2521(2). Specifically, Mr. Lamb’s “character and attitudes ... indicate that the commission of another crime is unlikely.” *Id.* at 2(i). As discussed above, the Supreme Court has recognized “acceptance of responsibility” as an important factor in considering whether to reduce a substantial sentence. See *Shideler*, 103 Idaho at 593.

The Idaho Court of Appeals recently overturned an excessive sentence based in part on the defendant’s acceptance of responsibility, in *Cook v. State*, 145 Idaho 482 (Ct. App. 2008). In *Cook*, the defendant pled guilty to nine counts of grand theft by deception, having defrauded nine different families out of 1.5 million dollars. He was

sentenced to eight consecutive prison terms of three-to-eight years. The Court of Appeals considered the defendant's acceptance of responsibility, the circumstances of the offense, the fact that the charges arose from one continuing plan of wrongdoing, the defendant's age, and his complete lack of a prior criminal record. *Id. at* 489. The Court found the sentence to be excessive, holding that

“we believe the court did not give sufficient consideration to the defendant's status as a first time offender, his expressions of remorse, [and] the likelihood of rehabilitation and deterrence possible with a lesser cumulative sentence” *Id.*

Mr. Lamb asserts that the *Cook* Court engaged in an appropriate weighing of all of the various factors at play, including the goals and objectives of sentencing under Idaho law, and came to a well-reasoned decision. Most importantly, Mr. Lamb notes that the factors considered by the *Cook* Court - acceptance of responsibility, the circumstances of the offense, the fact that the charges arose from one continuing plan of wrongdoing, the defendant's age, and his complete lack of a prior criminal record – directly apply to his case and personal circumstances. Mr. Lamb respectfully requests that this Court adopt the *Cook* rationale, apply it to his case, and reduce his sentence as this Court deems appropriate.

Mr. Lamb's acknowledgment of guilt, his expression of remorse, and acceptance of responsibility indicate a more lenient sentence was more appropriate. *See Kellis*, 148 Idaho at 815. The District Court erred by failing to properly consider this factor in imposing an excessive sentence upon Mr. Lamb.

4. Substance Abuse and Childhood History

Yet another mitigating factor supported a more lenient sentence. Mr. Lamb had a serious substance abuse issue before and during the time of his criminal behavior. (*See*

PSR, p. 9). This substance abuse began at a young age, during Mr. Lamb's childhood, and included his stepfather engaging him in actual alcohol and drug usage. *Id.* A troubled childhood is yet another factor sentencing courts should consider in mitigation. *See State v. Williamson*, 135 Idaho 618, 620 (Ct. App. 2001). Mr. Lamb reported during his PSR interview that his alcohol abuse began at approximately age twelve, and continued up to the date of his arrest. (*See* PSR, p. 9). Mr. Lamb further reported that he began using marijuana at age 9, and was a regular daily user. *Id.* Finally, Mr. Lamb reported that he used and abused methamphetamine on a daily basis for many years, and abused ecstasy and LSD as well. *Id.* However, despite this clear record of substance abuse, the District Court gave little or no consideration to this factor at sentencing, barely giving it a mention during the Court's comments in support of its sentence. (*See* Tr., p. 55, ls. 11-12.) This failure to recognize and consider Mr. Lamb's "troubled childhood", as concerns drug abuse and being misled to further abuse drugs and alcohol by his own stepparent, constitutes error. While this factor does not provide a legal defense or excuse for Mr. Lamb's behavior, it certainly represents a mitigating factor for the Court to consider. *See Williamson, supra.*

Additionally, Mr. Lamb was apparently sexually abused as a child himself. *See* PSR, p. 6. This abuse occurred when Mr. Lamb was approximately five years old, and was committed by a trusted family member. *Id.* The District Court failed to even mention this factor during Mr. Lamb's sentencing hearing, and therefore gave it no consideration whatsoever. (*See, generally*, Tr., pp. 48-59). However, again, this factor further supports the notion of a "troubled childhood" for Mr. Lamb, which, under Idaho case law, is deserving of consideration at sentencing. *See Williamson, supra.* Mr. Lamb

again asserts that the District Court erred in failing to properly consider this important mitigating information.

This Court should reverse for further proceedings to properly account for these mitigating factors.

5. Mental Health Issues

Finally, compounding those issues, Mr. Lamb was also diagnosed with Mood Disorder and “relevant personality issues. (See PSR, attachment 1, pp. 1; attachment 2, p.14). Additionally, Mr. Lamb’s Substance Abuse Assessment indicated that his symptoms were “consistent with a diagnosis of Major Depressive Disorder.” (PSR, attachment 1, p. 5). The Idaho Supreme Court has recognized that Idaho Code §19-2523 not only suggests, but requires, the trial court to consider a defendant’s mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581 (1999). For at least one year prior to his arrest, and likely longer, although the evaluations focused only on the prior twelve months, Mr. Lamb reported that such symptoms affected his behavior. (See, generally, PSR, attachment 1, pp. 5-7). In fact, in order to address these issues in relation to his behavior, it was recommended that he potentially receive counseling and psychotropic medication. *Id.* at p. 7.

Again, although the Court did mention mental health issues at Mr. Lamb’s sentencing hearing, the Court provided no explanation as to whether they entered into the Court’s consideration, and seemed to indicate that these mental health issues were being treated as aggravating, rather than mitigating, factors. (See Tr., p. 55, ls. 3-10). Mr. Lamb asserts that the District Court committed error by failing to properly consider his mental health issues at sentencing, and urges this Court to remand his case to remedy this error.

6. Plea Recommendation of Prosecuting Attorney

The prosecuting attorney, society's representative in this matter, agreed that a sentence of five years determinate, followed by an indeterminate term of life, was appropriate in this case. (Tr., p. 47). Such a sentence, in even the prosecutor's eyes, would have sufficiently addressed the sentencing goals and objectives.⁵ *Id.*

However, the District Court imposed a fixed or determinate term which was 300 percent longer than the prosecutor recommended. (*Compare* Tr., p. 47 *with* p. 57). Such a sentence was inappropriate because sentences are to be crafted so that they do not force the prison system to continue detaining a person once rehabilitation or age has decreased the risk of recidivism. *Cook*, 145 Idaho at 489; *State v. Eubank*, 114 Idaho 635, 639 (Ct. App. 1988). Mr. Lamb was only 28 years old when he was sentenced. (PSR, p. 1). Yet his sentence, if it stands, would ensure that he will be incarcerated for at least fifteen years (more than half his currentage) regardless of his rehabilitative efforts or maturation during that time. As such, his sentence operates contrary to the admonitions in *Cook* and *Eubank* and constitutes an abuse of discretion.

A sufficient examination of all these factors reveals that a more lenient sentence still addresses all the other sentencing objectives – protection of society, punishment, and deterrence. *See State v. Ransom*, 124 Idaho 703, 713 (1993)(requiring that alternative sentences still address all the sentencing objectives). The District Court not only ignored the recommendations of the prosecuting attorney, it also ignored the recommendation of the defense that the Court retain jurisdiction and send Mr. Lamb on a rider. (*See* Tr., pp. 36-37). This constituted an abuse of its discretion, as the District Court was required to

⁵ The defense argued that, in light of all the mitigating factors in this case, Mr. Lamb should have been afforded an opportunity at retained jurisdiction. (Tr., 36-37).

“consider[] all of the circumstances to assess the defendant’s ability to succeed in a less structured environment” *Statton*, 136 Idaho at 137.

The Idaho Court of Appeals provided guidance on this issue in *State v. Carrasco*, 114 Idaho 348 (Ct. App. 1988). In *Carrasco*, the Court of Appeals reviewed a sentence of thirty years indeterminate for heroin and cocaine delivery charges. The prosecution had recommended a sentence of ten years determinate. Relying in part on the fact that the prosecutor’s sentencing recommendation was ignored and that instead, “the district judge went a step further” and imposed a thirty year sentence, the Court of Appeals overturned the sentence, and reduced it by a third. *Id.* at 354. In doing so, the Court of Appeals recognized the state’s recommendation as a factor to consider in the sentencing decision. The *Carrasco* Court also noted that the reduced sentence would provide “correctional authorities greater flexibility in granting [the defendant] a parole, if and when he earn[ed] it.” *Id.* at 355. Mr. Lamb urges this Court to adopt the logic of the *Carrasco* decision and apply it directly to the facts in his case.

In Mr. Lamb’s case, if the sentencing court had imposed a sentence even somewhat close to the sentence recommended by the parties, it would still have imposed a substantial prison sentence. Therefore, both the retributive and the deterrent effects of the imposed sentence would still be present. *See State v. Crockett*, 146 Idaho 13, 14-15 (Ct. App. 2008)(discussing how a sentence for a period of probation addresses all the sentencing objectives and how the court’s continuing jurisdiction affects those objectives). However, the sentence would not be “longer than reasonably necessary to deter similar conduct in the future, to exact retribution, or to protect society.” *Carrasco*, 114 Idaho at 355.

In addition to the restriction of his liberty at the discretion of the Department of Corrections and his looming sentence, the defendant will also suffer deprivation of several of his rights (such as the right to possess a firearm)⁶, since this was a felony offense. Furthermore, the Idaho Board of Pardons and Parole retains the ability to revoke the parole and execute the original sentence if Mr. Lamb were to fail to adhere to the terms of his parole upon his release from prison. However, it could do so knowing that each of the statutory sentencing objectives had been properly addressed initially at the sentencing phase.

Based upon these factors, Mr. Lamb asserts that the District Court insufficiently considered all the mitigating factors, which led to its imposition of a clearly excessive sentence in an abuse of its discretion. Mr. Lamb prays that this Court remand this case with instructions to remedy that abuse of discretion.

II.

The District Court Committed Reversible Error When It Failed To Order A Mental Health Evaluation Of Mr. Lamb Prior To Sentencing

Mr. Lamb's mental health status was a significant factor at sentencing. The District Court specifically mentioned Mr. Lamb's mental health issues during sentencing. (Tr. p. 55). The PSR attachments included mental health diagnoses. *See*, PSR, attachment 1, pp. 1, 5; attachment 2, pp. 7, 9, 14. Nonetheless, the District Court proceeded forward at sentencing without a separate mental health evaluation.

The decision whether to order a mental health evaluation pursuant to I.C. §19-2522 is discretionary. *State v. Jockumsen*, 148 Idaho 817, 822 (Ct. App. 2010).

⁶ Mr. Lamb enjoys hunting and shooting, and therefore the penalty of losing the right to possess firearms is a significant additional punishment for him. (*See* PSR, p. 6)

However, as with any exercise of discretion, the district court's determination must be consistent with applicable legal standards. *Id.* "The legal standards governing the court's decision whether to order a psychological evaluation and report are contained in I.C. §19-2522." *State v. Collins*, 144 Idaho 408, 409 (Ct. App. 2007). Idaho Code §19-2522 provides that a mental health evaluation is mandatory if there is reason to believe that the mental condition of the defendant will be a significant factor at sentencing and for good cause shown. *State v. Coonts*, 137 Idaho 150, 152 (Ct. App. 2002); *State v. McFarland*, 125 Idaho 876, 879 (Ct. App. 1994).

Mr. Lamb's counsel did not object to the lack of a psychological or mental health evaluation in accordance with I.C. §19-2522 prior to the District Court's judgment of conviction. However, a district court is under an independent duty to order a mental health evaluation under I.C. §19-2522 under certain circumstances, even in absence of a request on the part of the defendant or his counsel. "A claim that the district court abused its discretion by failing to *sua sponte* order a psychological evaluation of a defendant before sentencing can be made on appeal without an objection to the lack of an evaluation or a request for an evaluation before the district court." *State v. Durham*, 146 Idaho 364, 366 (Ct. App. 2008). In that situation, the defendant must demonstrate that the district court manifestly disregarded the relevant provisions of Idaho Criminal Rule 32 by failing to order the psychological examination. *Id.* If the court's comments indicate that it found the defendant's mental condition and rehabilitative potential to be significant factors, and the district court nonetheless proceeds to sentencing "without the benefit of a professional diagnosis of that condition and prognosis for improvement,"

("Interests and Activities").

these are factors that support a finding under I.C. §19-2522 that a mental health evaluation is required. *See McFarland*, 125 Idaho at 881.

The analysis under I.C. § 19-2522 focuses on factors relevant to appropriate punishment, such as the degree of the defendant's illness and level of impairment, which may impact upon the defendant's overall culpability for the offense; the available treatments for his condition, along with the risks and benefits of treatment or non-treatment; and a consideration of the risk of danger that the defendant might pose if released back into the community. I.C. §19-2522(3).

The evidence before the District Court at Mr. Lamb's sentencing failed to address nearly all of the critical factors that are required to be included within a mental health evaluation for sentencing purposes. Unfortunately, the PSR contained limited mental health information for Mr. Lamb. (*See generally*, PSR, p. 8) However, the PSR author was well aware of the Psycho-Sexual Evaluation (*See id.*), having mentioned and discussed the Evaluation in the PSR, and having attached a copy to the PSR for the Court's consideration at sentencing. In the Evaluation, Mr. Lamb is clearly diagnosed with mental health issues, including Mood Disorder and "personality disorder with schizotypal features". *See* PSR, attachment 1, p. 1; attachment 2, p. 9. Despite clear indications from the psycho-sexual evaluator that Mr. Lamb had significant mental health issues, the PSR author made no mention of these issues in the PSR section regarding mental health. (*See* PSR, p. 8). This was error.

Unfortunately, the District Court compounded this error by not following up on this information and requiring a mental health evaluation. This omission clearly violates the dictates of Idaho Code §19-2522, which requires a court to consider such an evaluation under Mr. Lamb's circumstances.

Compounding the problem, the District Court specifically mentioned Mr. Lamb's mental health issues at the Sentencing Hearing, (*see* Tr., p. 55), yet made no effort to follow through with the mandate under Idaho Code to order a separate mental health evaluation. Since there was no mental health evaluation, it follows that there was no evaluation of what treatments were potentially available to Mr. Lamb in order to address his mental conditions, or any evaluation of the potential risk to the public if Mr. Lamb were to receive mental health treatment in lieu of incarceration.

The information available to the District Court prior to sentencing made it clear that there was reason to believe that Mr. Lamb's mental condition would be a significant factor at sentencing. However, the information properly available to the District Court did not adequately meet the requirements of I.C. §19-2522(3). In light of this, the District Court acted with manifest disregard for the provisions of Idaho Code §19-2522 and 2523 when it failed to order a psychological report or mental health evaluation for sentencing purposes. This Court should remedy this error and remand the case accordingly.

CONCLUSION

Based upon the above and foregoing, Mr. Lamb respectfully requests that this Court reduce his sentence as it deems appropriate.

In the alternative, Mr. Lamb respectfully requests that this Court vacate his sentence, and remand his case for a new sentencing hearing after a complete evaluation of Mr. Lamb's mental health conditions is made in accordance with I.C. § 19-2522 and I.C.R. 32.

In the alternative, Mr. Lamb respectfully requests that this Court reverse the District Court's judgment of conviction and remand this case for further proceedings.

DATED this 18th day of October, 2012.

COPY

PAUL E. RIGGINS
Attorney for Appellant Lamb

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of October, 2012, I served a true and correct copy of the foregoing document, by delivering a copy thereof in the method indicated below, to the following persons:

KENNETH K. JORGENSEN
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(Hand delivered to Attorney General's mailbox at Supreme Court)

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Paul E. Riggins